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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 135

STATE OF CONNECTICUT,

Appellee,

vs.

FRANK PALKO,

Appellant.

APPEAL FROM SUPREME COURT OF ERRORS, STATE OF CONNECTICUT

STATEMENT AS TO THE JURISDICTION.

Pursuant to Rule 12 (1) of the rules of this Court, the appellant submits this statement showing that the appeal in the above entitled action is properly before this Court.

Opinions Below.

There are two opinions of the Supreme Court of Errors of the State of Connecticut. The first is reported in 121 Conn. 669. The second is reported in 122 Conn. 529. No opinions were delivered by the Superior Court for Fairfield County, Criminal Side.

Jurisdiction.

The jurisdiction of this Court is invoked under Sec. 237 (a) of the Judicial Code as amended by the Act of February

13, 1925, c. 229, 43 Stat. 936, the Act of January 31, 1928, c. 14, 45 Stat. 54, and the Act of April 26, 1928, c. 440, 45 Stat. 466.

(1)

Appeal Timely Taken.

The final judgment from which this appeal is taken was entered on March 4, 1937. A petition for appeal accompanied by assignments of error was on May 10, 1937, presented to the Honorable William M. Maltbie, Chief Justice of the Supreme Court of Errors of the State of Connecticut, and the appeal was by him allowed on the same date. Citation of appeal with service acknowledged was filed on May 13, 1937, and the case was docketed in this Court on June 11, 1937.

(2)

The judgment forming the basis of the appeal is a final judgment in a sense that an affirmance of it would leave nothing to be done by the court below but to execute the judgment already rendered.

Georgia Ry. Co. v. *Decatur,* 262 U. S. 432, 437.

The judgment is on its face final in form as well as in substance, and disposes of all the elements of the controversy.

Haseltine v. *Central Bank of Springfield* (No. 1), 183 U. S. 130, 131.

(3)

Judgment of the Highest Court.

The judgment of the Supreme Court of Errors of the State of Connecticut is that of the highest court in which, under the laws of the State, such judgment could be had.

See *Silver* v. *Silver,* 280 U. S. 117;

See Article Fifth, Sec. 1, of the Constitution of the State of Connecticut, Page 33 of the General Statutes of the State of Connecticut, Revision of 1930.

There being no further right of appeal nor any discretionary review in a higher court, the appeal herein is taken from the "highest court of a State in which a decision in the suit could be had."

(a) **Death Warrant Issued.**

This is a capital case. On April 19, 1937, a death warrant was issued by the clerk of the court in accordance with the laws of the State of Connecticut.

Sections 1726c and 1727c, page 751 of the 1935 Cumulative Supplement to the General Statutes of the State of Connecticut, Revision of 1930.

(4.)

Validity of a State Statute Drawn Into Question and Decision in Favor of Its Validity.

In this suit appellant contended in the courts below that a state statute, as applied, was repugnant to the constitution of the United States. The decision of the Supreme Court of Errors of the State of Connecticut was in favor of the validity of the statute.

(a) **The Statute.**

The statute whose validity was drawn into question, is Title 60, Chapter 335, Sec. 6494 of the General Statutes of the State of Connecticut, Revision of 1930, found on page 1990 of the latter statute book. The statute in question provides:

"SEC. 6494. *Appeals by the state in criminal cases.* —Appeals from the rulings and decisions of the superior court or of any criminal court of common pleas, upon all questions of law arising on the trial of criminal cases, may be taken by the state, with the permission of the presiding judge, to the supreme court of errors, in the same manner and to the same effect as if made by the accused."

(b) **Application of the Statute or Nature of the Case.**

The validity of the above statute is questioned as applied to the following facts stated by the Supreme Court of Errors of the State of Connecticut in its second opinion:

> The appellant, Frank Palko, was indicted by a grand jury of Fairfield County, Connecticut, charged with murder in the first degree in the wilful, deliberate and premeditated killing of Thomas Kearney, at Bridgeport, Connecticut, on September 30th, 1935. Subsequently, at the January term of the Superior Court for Fairfield County, Criminal Side, he was brought to trial before the court and a jury which resulted in a verdict of guilty of murder in the second degree. The verdict was returned on January 24th, 1936, and on January 28th, 1936, the court sentenced the prisoner, as provided by law, to confinement in the Connecticut state prison at Wethersfield for the term of his natural life. On the same day, pursuant to a notice of intention to appeal, filed by the State, the trial judge granted in writing permission to the State to appeal; and, thereafter, on July 30th, 1936, this court rendered its judgment finding error in the instructions of the trial court to the jury upon the question of premeditation and also on certain rulings upon evidence, and a new trial was ordered. State v. Palko, 121 Conn. 670, 186 Atl. 657.
>
> The case then came to the September term of the Superior Court for Fairfield County, and was tried before the court and a jury; and on October 15th, 1936, the jury returned a verdict of guilty of murder in the first degree; and the court thereupon imposed upon the appellant, Frank Palko, the sentence of death by electrocution, as provided by law. From this judgment the appellant, Frank Palko, appealed to the Supreme Court of Errors of the State of Connecticut, and now appeals to the Supreme Court of the United States.

Upon the second trial in the Superior Court for Fairfield County, the appellant, Frank Palko, prior to the commence-

ment of examination of the veniremen, moved that the indictment for first degree murder be dismissed on the grounds that the second trial of this action would result in placing him twice in jeopardy for the same offense. This motion was repeated after the jury was impaneled and sworn in and before any evidence was taken. In both instances the grounds of the motions were that the second trial placed the life of the appellant, Frank Palko, twice in jeopardy for the same offense and thus violated the Constitution of the State of Connecticut as well as the Fourteenth Amendment of the Constitution of the United States. Both motions were denied and the appellant, Frank Palko, duly excepted.

After sentence and judgment were rendered in the Superior Court for Fairfield County, the appellant, Frank Palko, appealed to the Supreme Court of Errors of the State of Connecticut, and among the errors assigned were the denials of the two above mentioned motions.

(c) **Constitutional Question Timely Raised.**

The validity of the above statute was first drawn into question by the motions to dismiss the indictment for first degree murder mentioned above. The Federal questions were thus duly raised in the court below, although, for the purposes of the jurisdiction of this Court in this case, it is immaterial whether the constitutional questions were actually raised, since they were expressly decided by the State court, and were therefore "drawn into question."

Home Ins. Co. v. *Dick,* 281 U. S. 397, 407.

(d) **Constitutional Questions Sufficiently Raised.**

The above constitutional questions were raised in general terms without specifying the particular clauses in the Fourteenth Amendment. Appellant is aware of the cases in which it has been intimated by this Court that a gen-

eral reference to the Fourteenth Amendment may not be sufficient.

Hiawassee Power Co. v. *Carolina-Tennessee Power Co.*, 252 U. S. 341, 343.

But in such cases the doubt as to whether the constitutional questions have been raised with sufficient particularity is of no importance if the State court expressly passes on the constitutional questions, as it did in this case.

This appears clearly from the second opinion of the Supreme Court of Errors of the State of Connecticut where the issues involving the due process clause and the privileges and immunities clause of Section 1 of the Fourteenth Amendment are considered at length by the State court in reaching its conclusions.

Bryant v. *Zimmerman*, 278 U. S. 63, 67.

(5).

Substantial Federal Questions.

The appellant has assigned as errors various rulings by the court below that the statute in question when applied to the facts in question did not transgress the due process clause on the privileges and immunities clause of the Fourteenth Amendment of the Constitution of the United States.

(a) **Application of the Statute Without Due Process.**

One of the major issues in this case has been raised once before in this Court but never decided, although this Court considered the question very important.

Dreyer v. *Illinois*, 187 U. S. 71, 85-86.

It would appear from the *dicta* of this Court in that case that, if the facts in question had required a decision on the point of due process under the Fourteenth Amendment, this

Court would probably have found that the appellant there involved had been deprived of due process of law. It is significant that Mr. Justice Harlan, who wrote the majority opinion in the *Dreyer* case, also wrote strong and well-reasoned dissenting opinions in *Hurtado* v. *California,* 110 U. S. 516, 538, and *Maxwell* v. *Dow,* 176 U. S. 581, 605, 615.

(b) Application of the Statute in Violation of the Privileges and Immunities Clause.

This question, like that involving the due process clause, is one upon which, to the best of counsel's knowledge, no decision in point has ever been rendered by this Court. Its importance as a Federal question, like that of the due process clause, cannot be questioned: One of the fundamental rights of every citizen of the United States is the right not to be subjected to double jeopardy. State lines do not necessarily determine the matter of Federal privileges and immunities.

Colgate v. *Harvey,* 296 U. S. 404, 428.

A citizen of Connecticut is a citizen as well of the United States, and the State cannot deny him rights which belong to him under the Federal Constitution.

Colgate v. *Harvey,* 296 U. S. 404, 431.

The peculiar interpretation of the doctrine of double jeopardy by the Connecticut courts upon the facts of this case deserves the careful scrutiny of this Court, and also an original inquiry into that doctrine by this Court under the Constitution of the United States. It is the fundamental element in determining whether or not the appellant has been deprived of his privileges and immunities as a citizen of the United States and of his life contrary to due process of law under the Fourteenth Amendment.

Kepner v. *U. S.,* 195 U. S. 100, 132-133.

The facts in this case are not in dispute. Appellant does contend, however, that the interpretation given them by the Supreme Court of Errors of the State of Connecticut is erroneous in that it decides they do not constitute double jeopardy. Mainly upon the legal effect thus given these facts does the constitutionality of the statute in question depend., This Court has the right to determine independently of such interpretation the legal effect of admitted facts under the Fourteenth Amendment.

Truax v. *Corrigan*, 257 U. S. 312, 324, 325.

In this respect, also, this Court is not bound by the characterization given to a State statute by a State court where a Federal right is concerned; nor is this Court relieved from the duty of considering the real nature of the statute and its effect upon the Federal right asserted. See *Carpenter* v. *Shaw*, 280 U. S. 363, 367.

The appellant submits, therefore, that whether his constitutional claims rest on the due process clause or on the privileges and immunities clause, this Court has jurisdiction to consider both questions on the merits.

WHEREFORE, it is respectfully submitted that the appeal in the above entitled cause comes within the proper jurisdiction of this Court.

Dated at Bridgeport, Connecticut, this 10th day of May, 1937.

FRANK PALKO,
The Appellant,
By DAVID GOLDSTEIN,
His Attorney.

Filed May 11, 1937. Henry P. Lyons, Clerk.

EXHIBIT "A".

STATE OF CONNECTICUT

vs.

FRANK PALKO.

121 Conn. 669.

Maltbie, C. J., Hinman, Banks, Avery and Brown, Js.

Argued June 11th. Decided July 30th, 1936.

INDICTMENT charging the defendant with the crime of murder, brought to the Superior Court in Fairfield County and tried to the jury before *Cornell, J.;* verdict and judgment of guilty of murder in the second degree, and appeal by the State. *Error and new trial ordered.*

William H. Comley, State's Attorney, with whom, on the brief, was *Lorin W. Willis,* Assistant State's Attorney, for the appellant (State).

David Goldstein, with whom were *Johnson Stoddard,* Public Defender, and *William Dorkin,* for the appellee (defendant).

BROWN, J.:

By its brief the State has limited the errors assigned upon this appeal to six, the first relating to the court's charge to the jury, and the others to rulings upon evidence. Upon the trial the State offered evidence to prove and claimed to have proved these facts material to the claimed error in the charge: Late in the evening of September 29th, 1935, the accused, taking with him a revolver which he had possessed since obtaining it from Ryan's Tavern several months before, with Frank Burke, left their apartment at #590 Fairfield Avenue in Bridgeport and going to Gilman's Music Store at #243 Fairfield Avenue, just after midnight broke in the show window thereof, from which each seized and carried away a radio, departing by different routes on the return to their apartment. In

breaking the plate glass window with the revolver, the grips thereof were broken off and were found there shortly after. When the accused had reached a point on the southerly side of Golden Hill Street, an officer stepped out from each side of a police car which had drawn up to him, the one on the left laying his hands on him and asking where he was going with the radio. Thereupon the accused, who was carrying his revolver in the sleeve of his coat, let it drop down into his hand and fired one shot into this officer, and then turning as the other came near, fired a shot into him. He then ran west some fifty feet, where another police car drew up, and as an officer started to get out, he fired a shot into it which lodged in the cushions of the rear seat. Dropping the radio, the accused then ran on by streets and back yards toward his apartment, pausing behind a wall to recover his breath and reload his revolver, after which he walked the rest of the way. Upon his arrival, he told Thomas Iwanicki that as he had approached the apartment, another police car had come up and that if either of the policemen in it had "made a break" for him, he would have shot them too. At this time, shortly after 1 o'clock in the morning, and also between 2 and half past that morning, the accused appeared to be sober. Wilfred Walker, one of the officers shot, and Thomas J. Kearney, the other, for whose murder the accused was on trial in this proceeding, each died within a few hours from his wound inflicted by the accused. At the time of the killing the accused was on parole from Elmira Reformatory where he had been sentenced for rape.

The accused offered evidence to prove and claimed to have proved these facts material in this connection: On September 29th, 1935, the accused, who shared an apartment on Fairfield Avenue with Frank Burke and Thomas Evans, knew this avenue to be well illuminated at night and that police headquarters was located thereon. From about 3 o'clock on that afternoon the accused and Burke continued to drink rye whiskey in the apartment until 6 o'clock when they were out and had a sandwich for supper, and then returned for a few minutes, doing more drinking.

After visiting two cafes, where the accused drank four glasses of beer, they returned to the apartment at 8 o'clock and started to drink again. Shortly thereafter, the accused became intoxicated and does not recall any of the circumstances relating to the breaking and entering into Gilman's Music Store, or the shooting of the police officers. And he became so intoxicated by shortly after 9 o'clock that he does not recall seeing Jack Burke, who came to the apartment shortly before 3 o'clock in the morning of September 30th, 1935, or have any recollection of anything further that occurred until the police arrived in his room at that hour. The accused first suspected he might be involved in any way in the breaking and entering or in the shooting of the two officers, at half past 6 that morning when Evans told him and Frank Burke that they were involved therein. It was a part of the accused's revolver which had been in his possession prior to September 29th, 1935, which was found in the entrance of Gilman's Music Store on the morning of the following day.

The State contends that upon the situation so disclosed, the court's charge concerning the essential elements of premeditation and deliberation in the crime of first degree murder was inadequate, inaccurate, and misleading to the jury. Its claim is that while the definitions used by the court in this connection for the most part at least, may be supported by authority, and are properly applicable to the case of the seemingly law-abiding citizen who for motives difficult to trace and under impulses open to contradictory interpretation, kills an enemy or a friend, involving some transition, some traceable mental reaction, from a man to whom murder is an unthought of deed to one intent upon killing, the same does not hold true in such case as this, where the State's evidence discloses a gunman setting out armed with a loaded revolver to commit burglary, prepared in advance to kill if necessary either to accomplish the crime or to make good his escape. Obviously an instruction sufficient in the former case might be entirely inadequate for the latter. The question is whether the court's charge as given was sufficient upon these issues.

The trial court in a general explanation of the elements of first degree murder instructed the jury that to constitute premeditation there must be between the time the perpetrator forms an intention to kill and the instant when he carried out such intention "an interval of time during which he gave thought to and reflected upon his purpose sufficiently to know what he was doing and what the probable effect of his doing it would be upon his victim. It will occur to you that where a man suddenly makes up his mind to kill another and instantly shoots or otherwise fatally injures him, there is no opportunity for such consideration of what he is doing to enable him to comprehend the nature of his act or the result of it to the object of his attack. In such case there can be no premeditation since intent to kill and the performance of the act of killing coincide and practically take place at the same instant." The trial court then repeated the charge as to the necessity of an interval of time elapsing between the formation of the intent and the commission of the crime, adding that the court does not attempt to say that any particular period of time shall have elapsed provided it is sufficient to afford the perpetrator sufficient opportunity for thought as to his purpose, and that in some cases this may be a very short time and in others a longer period.

In view of the claims of the parties the effect of this charge, particularly in the use of the word "reflection" and the emphasis placed by the trial court upon the application of the principle as applied to a sudden killing, would tend to center the attention of the jury upon the brief interval that passed between the time when the officer placed his hand upon the arm of the accused and the shooting. Had the trial court gone on to give to the jury adequate instructions as to the application of the general principles it had stated, to the evidence in this case, this portion of the charge might not have constituted reversible error. Later in the charge the court did refer to the State's claim that the fact that the accused at the time of the shooting was escaping with stolen property afforded ground for the inference that it was not done upon sudden impulse without opportunity for reflection, but rather as

the outcome of a formed design to shoot anyone who might interfere with his escape, with full opportunity to comprehend the character and probable result of such a purpose and that the shooting of Kearney was but the result of his alertness in carrying out this plan. But this statement of the claim of the State omitted the vital factor that the defendant had set out armed to commit a crime, nor did it in any way comment on this claim or the bearing which the facts would have if the jury found them proven, upon the issue of premeditation.

Thereafter the trial court stated that it was in evidence that a car stopped beside the defendant, somebody alighted and put his hand on the shoulder of the accused and asked where he was going with the radio; and it then charged the jury as follows: "Now, I have already told you gentlemen, that the time required to form a specific intent to kill, to premeditate and to deliberate, may be longer, it may be short, but it must be sufficient for the person involved to know what kind of an act he was about to perform, and its probable effect upon his victim. Now, I am only suggesting this to you, I am not suggesting any conclusion to you, but I am suggesting to you that you consider the hypothesis that I suggested to you, whether or not, if this statement is true, that the accused saw the scout car as it approached him, before it stopped, and as he says: 'Then I let the gun slip from my sleeve into my hand, and I turned around and fired.' Now, gentlemen, again, I am suggesting no conclusion to you, but if you find the facts established, and whether they are established or not you are to decide, and if you find them established you should consider further the length of time involved in these operations; whether or not there is any evidence in the fact that the gun slipped from his sleeve into his hand, after seeing the car stop, which would tend to establish what the intention of the accused was, and whether or not he had the specific intention to kill, and to premeditate, bearing in mind always that the fact must be established beyond a reasonable doubt."

The effect of this charge could hardly have been other than to leave with the jury the impression that in determin-

ing whether the murder was premeditated they were to confine their attention to the brief interval of time between the moment when the officer accosted the defendant and the shooting. It is of course sound law that an interval of time sufficient for thought as well as action must exist, but it was error for the trial court to leave with the jury the impression that in case of an armed burglar who is stopped in his efforts to escape with the stolen property, in determining whether or not there was premeditation they are to regard only the incalculable moment between his realization of the threat of arrest and the pulling of the trigger ready to his hand for that very purpose. He has gone out for the double purpose to burglarize and to escape. It would be as absurb to say that whether he plans to steal is to be determined only as of the moment when he has his hand on the loot, as to say that only the interval of time between the moment when the criminal is accosted by the officer and the instant of the shooting is to be considered in determining whether the crime was premeditated. The charge in thus confining the attention of the jury in determining whether premeditation existed to this brief moment of time, and giving no instructions as to the significance of the conduct of the accused in setting out armed under the circumstances as claimed by the State was inadequate for their guidance. From it they could well have understood that even though they found the killing occurred as contended by the State it would not constitute murder in the first degree. Upon quite similar facts, in the case of a criminal setting out armed to commit a crime and secure his retreat, who in the course of the enterprise killed an officer attempting to arrest him and was found guilty by the jury of murder in the first degree, we said that "the verdict reached by the jury was the only verdict reasoning minds could have reasonably reached upon the evidence." State v. Chapman, 103 Conn. 453, 469, 130 Atl. 899; see also State v. Simborski, 120 Conn. 624, 629, 182 Atl. 221. There was reversible error in the charge as to premeditation.

The State claims that the court erred in excluding on its cross-examination of the accused, questions as to his possession of the revolver with which he shot Kearney. These were claimed to show that the accused had obtained it by

burglarizing Ryan's Tavern, to affect his credibiiity. The accused by taking the stand in his own behalf waived the privileges accorded to him under the law as a person accused of crime, and became as any other witness and subject to the same tests of cross-examination. Fitzpatrick v. United States, 178 U. S. 304, 315, 316, 20 Sup. Ct. 994. He therefore had rendered himself subject to cross-examination upon such acts of misconduct as indicate a lack of veracity; Shailor v. Bullock, 78 Conn. 65, 70, 61 Atl. 65; and that such cross-examination might establish that the accused had been found guilty of another crime is no reason for its exclusion. Harper v. State, 106 Ohio St., 481, 140 N. E. 364; 3 Wharton, Criminal Evidence (11th Ed.) Sec. 1387. The commission of statutory burglary falls within this category. This crime is one involving moral turpitude. Drazon v. New Haven Taxicab Co., 95 Conn. 500, 111 Atl. 861. This latter fact, however, obviously affords no meritorious basis for the suggestion made by counsel for the accused in objecting to these questions, that because of sec. 5582 of the General Statutes, providing that a witness is not disqualified because of conviction of crime but that such conviction may be shown to affect his credit, such fact could only be brought out by offering the record of his conviction. The purpose of the statute was to remove the eommon-law disqualification of a witness because of a conviction of crime with a provision, however, that such conviction might be shown to affect his credit. It has nothing to do with the method by which such conviction shall be shown. The record indicates that the court adopted this suggestion as a reason for excluding the questions. This was error. The admission of such evidence is in a measure within the discretion of the court. Spiro v. Nitkin, 72 Conn. 202, 205, 44 Atl. 13. While we should hesitate to hold the court's ruling, upon this record, constituted a proper exercise of its discretion, the adoption of the above reason therefor of itself rendered it erroneous.

The State further claims that the court erred in excluding its question on cross-examination of the accused, seeking to bring out that the loaded revolver and money found upon his person when arrested in Buffalo, New York, on October 29th,

1935, were obtained by a robbery committed by him subsequent to the killing of Kearney, for the purpose of affecting his credibility. Under the rule in Shailer v. Bullock, supra, this evidence was admissible for the purpose claimed, and upon the whole situation shown by the record, the court's exclusion of it constituted error.

The court's refusal to permit the State to show through its witness Sergeant Carroll, who participated in the arrest of the accused at Buffalo, the circumstances attending the arrest and what the accused had upon his person at the time, is also assigned as error. It was conceded that the accused had fled following the shooting of Kearney, and that he was in the course of that flight and evading arrest when apprehended by Carroll and the other officers at Buffalo, and that at the time he had in his possession a revolver, a blackjack and a substantial sum of money, though he had none of these identical articles at the time of the crime here charged. The State claimed the right to prove these facts as bearing upon the conduct and guilty knowledge of the accused. Upon the whole situation shown by this record a majority of the court hold that the trial court's exclusion of this evidence was within its discretion.

The State claims that the court erred in excluding the testimony of its witness Officer Bray of a confession made by the accused after his arrest in Buffalo. He made the statement while incarcerated in the police station, after the officer had told him the police had obtained the entire story from Evans and Jack Burke and wife who were locked up in Bridgeport, which was untrue, and that he had better tell the truth. He was not cautioned that he did not have to say anything that might be used against him. The officer also testified that no promise of reward or threat was made to the accused to induce the statement. His testimony was the only evidence upon the subject. The record and the accused's brief indicate four grounds relied upon for excluding the evidence. The first, because it was made while he was in custody, is not based upon authority. The established rule is to the contrary. Commonwealth v. Chance, 174 Mass. 245, 249, 54 N. E. 551; People v. Owen, 154 Mich. 571, 118 N. W. 590; Balbo v. People, 80 N. Y. 484; Hopt v. Utah, 110

U. S. 574, 4 Sup. Ct. 202; 2 Wharton, Op. Cit., Sec. 610; 1 R. C. L. 565, Sec. 111; 16 C. J. 719, Sec. 1473. The same is true of the second, that he was *not* warned as to his constitutional rights. The test of admissibility is whether the confession was voluntary, and not whether the accused was well advised. State v. Castolli, 92 Conn. 58, 67, 101 Atl. 476; State v. Hand, 71 N. J. L. 137, 58 Atl. 641; 2 Wharton, Op. Cit. Sec. 627; 16 C. J. 723, Sec. 1482. The third, because the officer said to the accused that he had better tell the truth, is contrary to the great weight of better reasoned authority. State v. Gee Jon, 46 Nev. 418, 428, 211 Pac. 676, 678, and cases cited; 2 Wharton, Op. Cit., Sec. 625, 1 R. C. L. 555, Sec. 102; 16 C. J. 721, Sec. 1476. As has been well said, such advice "cannot possibly vitiate the confession, *since* by hypothesis the worst that it can evoke is the truth and there is thus no risk of accepting a false confession." 2 Wigmore, Evidence (2d Ed.) Sec. 832. The fourth is because the officer represented that certain parties connected with the affair had made statements and were under arrest.

One claim thereunder is that since these untrue statements induced the accused to confess, the confession was involuntary and so inadmissible. This is not the law. "The object of evidence is to get at the truth, and a trick which has no tendency to produce a confession except one in accordance with truth is always admissible." Commonwealth v. Cressinger, 193 Pa. St. 326, 337, 44 Atl. 433. See also State v. Willis, 71 Conn. 293, 307, 41 Atl. 820; Price v. State, 18 Ohio St. 418; Fife v. Commonwealth, 29 Pa. St. 429, 435; 2 Wigmore, Evidence (2d Ed.) Sec. 841; 2 Wharton, Op. Cit., Sec. 623. The other is that since he may have made the confession in order to assume responsibility and exonerate Frank Burke, it is inadmissible. But the rule is well established that one's motive in confessing is of no importance, provided it does not result from threats, fear, or promise made by persons in actual or seeming authority. Jones v. State, 18 Ga. App. 310, 89 S. E. 347; State v. Griffin, 48 La. Ann. 1409, 20 So. 905; State v. Staley, 14 Minn. 105, 113; 16 C. J. 719, Sec. 1470. Furthermore, the court did not find, and could not reasonably have found upon this record, that Palko confessed because of his promise to assume the blame.

Nor is there anything to indicate that his alleged assumption of guilt was not based upon actual guilt. His defense involved no affirmation of innocence of the act of firing the fatal shot, but was confined to one of no knowledge thereof by reason of intoxication.

The court in excluding the confession did not detail all of its reasons therefor. It did, however, suggest as such, the accused's incarceration, his claimed promise to take the responsibility, the false statements made by Bray, "and all the other surrounding circumstances." Although such a ruling is an exercise of the court's discretion, a question of duty is involved, and its action is therefore reviewable upon appeal. State v. Willis, 71 Conn. 293, 313, 41 Atl. 820; State v. DiBattista, 110 Conn. 549, 563, 148 Atl. 664. In view of the undisputed evidence that nothing occurred in obtaining this confession to render it involuntary, and of the court's reliance in part at least upon legal principles which were incorrect, as we have above indicated, its exclusion of the evidence was erroneous. Containing, as the confession did, a detailed recital, not only of the fatal shooting, but of all of Palko's other acts on the night in question, its importance to the State's case to refute his defense of intoxication rendering him totally oblivious throughout this period, is apparent. Nor was this obviated by the testimony of Jack Burke and Evans, that the accused had admitted to them the doing of these acts, for the jury might well have disbelieved them, particularly in view of the court's comment in the charge upon their testimony, but found the confession to be true. This ruling constituted reversible error.

In view of our conclusion that the confession should have been received in evidence, the remaining error assigned, relating to the court's exclusion of cross-examination of the accused upon facts contained in the confession, becomes immaterial.

There is error and a new trial is ordered.

In this opinion all the judges concurred, except that Maltbie, C. J., and Brown, J., were of the opinion that it was error to exclude the evidence concerning the arrest of the defendant, and Hinman and Avery, Js., dissented

from the decision that the confession made by the accused should have been admitted in evidence.

EXHIBIT "B".

STATE OF CONNECTICUT

v.

FRANK PALKO.

Fairfield County, February Term, 1937.

Indictment charging the defendant with murder in the first degree, brought to the Superior Court in Fairfield County, where the defendant's motion for a change of venue was denied. Ells, J., and the issues were tried to the jury before Ells, J.; verdict and judgment of guilty, from which the defendant appealed.

No error.

David Goldstein, with whom, on the brief, was Johnson Stoddard, for the appellant (defendant).

William H. Comley, State's Attorney, with whom, on the brief, was Lorin W. Willis, Assistant State's Attorney, for the appellee (the State).

AVERY, *J.*

The accused was indicted by a grand jury of the county of Fairfield, charged with murder in the first degree in the wilful, deliberate and premeditated killing of Thomas Kearney, at Bridgeport, September 30th, 1935. Subsequently, at the January term of the Superior Court in Fairfield County, he was brought to trial before the court and a jury which resulted in a verdict of guilty of murder in the second degree. The verdict was returned on January 24th, 1936, and on January 28th the court sentenced the prisoner, as provided by law, to confinement in the Connecticut state prison at Wethersfield for the term of his natural life. On the same day, pursuant to a notice of intention to appeal, filed by the State, the trial judge granted in writing permission to the State to appeal; and, thereafter, on July 30th, 1936, this court rendered its judgment finding error

in the instructions of the trial court to the jury upon the question of premeditation and also on certain rulings upon evidence, and a new trial was ordered. State v. Palko, 121 Conn. 670, 186 Atl. 657. The case then came to the September term of the Superior Court in Fairfield County and was tried before the court and a jury; and, on October 15th, 1936, the jury returned a verdict of guilty of murder in the first degree; and the court thereupon imposed upon the accused a sentence of death as provided by law. From this judgment the defendant has appealed.

In the assignments of error, it is claimed that the trial court erred in refusing to set aside the verdict; in its instructions to the jury; in certain rulings upon evidence; in refusing to grant a change of venue; and, finally, that the second trial placed him twice in jeopardy for the same offense in violation of his constitutional rights under the state and federal Constitutions. The last two assignments are the only ones which are seriously pressed upon this appeal either in brief or in argument. As the case, however, is a capital one, we have examined the entire record under all the assignments.

The denial of the motion to set aside the verdict is to be decided by determining whether the jury might reasonably have found that the evidence established beyond a reasonable doubt the guilt of the accused as charged with the commission of the crime of murder in the first degree by evidence equivalent to that of two witnesses. There was evidence from which the jury might have found beyond a reasonable doubt that late in the evening of September 29th, 1935, accompanied by Frank Burke, the accused took with him a revolver which he had possessed for several months, left his apartment at 590 Fairfield Avenue in Bridgeport and went to Gilman's Music Store at 243 Fairfield Avenue; and, just after midnight, broke into a show window. Each took a radio and carried it away, departing by different routes. In breaking the plate glass window with the revolver, the grips were broken and were found there shortly after. Stamped upon these grips were the letters "U. S." which was the trade name of the 32 caliber revolver possessed by the accused. The accused proceeded east on Fair-

field Avenue to Broad Street, thence northerly to Elm Street, thence west to Harrison Street, thence north to Golden Hill Street, and west along the south sidewalk of that street. As he was so proceeding on Golden Hill Street, a police radio car, occupied by Sergeant Kearney and a patrolman, drew up at the south curb. One of the officers stepped out of the car on the left-hand side and laying his hand on the shoulder of the accused, inquired where he was going with the radio. The other officer stepped out of the right-hand side of the car and proceeded to where the defendant was standing. As the first officer accosted the accused, he was shot by the latter who then turned to the other officer and shot him. The accused stated in a confession in evidence that if he had not been on parole he would not have shot the officers. Thereafter, the accused ran west on Golden Hill Street, about fifty feet, when another police car approached and as the officer therein started to alight, the accused fired a shot the bullet lodging in the cushion of the rear seat of the car. The accused dropped the radio onto a rampway leading to a garage on the south side of Golden Hill Street, then ran west to Courtland Street, thence among several buildings and backyards to Fairfield Avenue, and walked west to the rear entrance of the apartment from whence he had started. As the result of the wounds inflicted, Sergeant Kearney died the following day.

These facts were abundantly supported by the testimony in the amount required under our law. The statutory requirement for conviction in a capital case that there shall be the testimony of at least two witnesses or its equivalent, General Statutes, Sec. 6479, does not mean that there must be two or more witnesses testifying to the same fact or to each fact. "If there be two, or more witnesses, each testifying to different parts of the same transaction, or to different circumstances attending it, and all concurring to prove the crime alleged; this will be sufficient to warrant a conviction, though there should not be two witnesses to any one fact." State v. Schutte, 97 Conn. 462, 467, 117 Atl. 508. The evidence justified the inference that the accused had the revolver in his possession and intended to shoot and to kill, if necessary, to prevent his capture. The

jury could reasonably have found a design on the part of the accused to effect the death of any person, if necessary, to prevent his capture and effect his escape and that the shooting of the officer was wilful, deliberate and premeditated. State v. Simborski, 120 Conn. 624, 629, 182 Atl. 221; State v. Chapman, 103 Conn. 453, 468, 130 Atl. 899. The trial court did not err in denying the accused's motion to set aside the verdict.

In his brief, the accused has selected isolated parts of the charge and claims that the jury may have been prejudiced thereby. It is sufficient to dispose of the claims of the accused in reference to the charge by the fact that the assignments of error in no way comply with the rules. The rules (Practice Book, Sec. 362) require that all assignments of error shall be specific. The assignment of error in this case alleges that the court erred "in failing to charge the jury in an adequate and sufficient manner to fully present the issues and questions of law involved so that the jury could * * * return a verdict in accordance with the law." Such a general assignment does not comply with our rule and does not merit consideration. "It should be distinctly and specifically stated in what respects and how these general objections apply." Beitler v. Rudkin, 104 Conn. 404, 405, 133 Atl. 214; State v. Tripp, 84 Conn. 640, 643, 81 Atl. 247.

In the brief, a sentence and a part of a sentence are taken from the charge, without reference to the context or the remainder of the court's instructions, and claimed to have been erroneous. The trial court, in informing the jury that they were not exclusive judges of the credibility of witnesses, among other things observed: "Necessarily, gentlemen, if you find that there are any witnesses in this case who might have some motive for testifying as they have testified, either wholly or in part, you should take such a fact into consideration in weighing the testimony of such person, because in so far as it may be affected, of course, in so far as it is affected, it is less reliable." The jury could not have understood the whole sentence as informing them otherwise than if the jury found that any witness had a motive for testifying falsely they had a right to consider

that in weighing his testimony, and the fact that the accused appearing as a witness has a vital interest in the result of the trial is not an exception to this rule. State v. Schleifer, 102 Conn. 708, 725, 130 Atl. 184.

At another point in the course of the charge, the court stated: "There is no evidence in the case which would excuse, justify, mitigate, or extenuate the shooting or slaying of Sergeant Kearney, so that if you find the accused not guilty of murder in the first degree, if you find that it was he who shot and killed Sergeant Kearney, he will be guilty of murder in the second degree, unless you also find that he was in such a condition of intoxication at the time he shot Sergeant Kearney that his mind could not conceive or entertain malice aforethought, as I have explained the meaning of that term to you, in which case he would be guilty of manslaughter." The brief of the accused seeks to take the first part out of this sentence but it must be considered with reference to what immediately followed and to the charge as a whole and it is evident that the jury could not have understood it as meaning otherwise than that there was no evidence in the case of a justifiable or excusable homicide to take from the killing of the officer the condemnation of an unlawful homicide; and the court then proceeded to instruct the jury with regard to three possible verdicts which they might return in case they found that the accused did the shooting. There is no indication in the finding that there was evidence of any circumstances of excuse or justification and the charge was not erroneous. State v. Chapman, 103 Conn. 453, 485, 130 Atl. 899. In their brief, counsel for the accused concede that the charge of the court as a whole was eminently fair to the accused. We do not find prejudicial error in the two passages to which reference is made in appellant's brief.

The accused assigns error in three rulings upon evidence. Lieutenant Bray of the Bridgeport police department was called as a witness by the State and testified that the accused made a confession to him while under arrest in the city of Buffalo. In this confession, the accused described breaking into Gilman's Music Store and the shooting of the police officer which occurred on Golden Hill Street shortly there-

after. After recounting in considerable detail his participation in these events, the accused stated that "before the shooting of the officers, we broke into a gas station on John Street near West Avenue." Objection was directed to this concluding sentence of the claimed confession, the substance of the objection having been that it was immaterial and tended to prejudice the accused by showing his participation in another crime unconnected with the crime for which he was being tried. The objection was properly overruled by the court. The part of the confession to which the objection was specifically directed contained in itself an admission of the shooting of the police officer; and that admission would be unintelligible if the remainder of the sentence were omitted. The entire narrative of the accused so far as it bore upon the crime of which he was charged was admissible, and the repetition of all he said with reference to that crime cannot be considered as an attempt on the part of the State to prove an independent and distinct offense. Commonwealth v. Weston, 297 Pa. St. 382, 147 Atl. 79, 82; People v. Loomis, 178 N. Y. 400, 405, 70 N. E. 919, 921; 4 Wigmore, Evidence (2d Ed.) Sec. 2100. "That evidence tends to prove the commission of other crimes by the accused does not render it inadmissible if it is otherwise relevant and material." State v. Simborski, supra, 631; State v. Chapman, supra, 481.

A similar ruling was made by the court in admitting the testimony of Sergeant Carroll, of the Bridgeport police department, who testified that later at Buffalo the accused repeated the confession previously made to Lieutenant Bray; and stated in the same language that prior to breaking and entering into the Gilman Music Store he had broken into a gasoline station on John Street near West Avenue. In rebuttal, the State called, as a witness, Daniel J. Hurley, who testified that he lived opposite a gasoline station on John Street and that about 11 o'clock in the evening of September 29th, from a window in his house, he was able to see the interior of the gasoline station; that he there saw a man moving about who resembled the accused, and that he had a bulge in his left hip pocket and described in some detail his movements, and the manner in which he

gained entrance. This testimony was objected to as not proper rebuttal, but was admitted by the court over the objection of the accused. The accused had taken the stand as a witness in his own behalf and his contention was that he had been drinking intoxicating liquor that afternoon and evening and was so intoxicated that he had no recollection of what occurred at midnight that night when the policeman was shot. It was permissible for the State in rebuttal of this testimony of the accused to show that about an hour before the shooting, the accused had been acting as would a person in possession of his faculties. That he had happened to be so seen while robbing another building did not render the evidence inadmissible.

Prior to the trial, the accused moved the court for a change of venue on the ground that there had been such wide publicity of a nature so derogatory to him that a fair trial by an impartial jury could not be had in Fairfield County. The burden of showing this is upon the mover of the change of venue. State v. Chapman, supra, 470. The power to grant a change of venue is to be exercised with caution and rests in the court's sound discretion, which is final unless it appears clearly that it has exercised its discretion unreasonably. State v. Cianflone, 98 Conn. 454, 461, 120 Atl. 347; State v. Luria, 100 Conn. 207, 209, 123 Atl. 378. The only way by which the question could properly be presented to us as to whether the trial court erred in denying the motion would be upon a finding. State v. Chin Lung, 106 Conn. 701, 717, 139 Atl. 91. We have, however, examined the transcript of evidence offered in support of the motion and we cannot say that the trial court unreasonably exercised its discretion in denying it.

The principal contention of the accused on this appeal is that General Statutes, Sec. 6494, which permits the State to appeal in a criminal case with the permission of the trial court, is in violation of Sec. 9 of Article First of the Constitution of Connecticut and Sec. 1 of Article XIV of the amendments to the Constitution of the United States; his contention being that the jury on the first trial, having found him guilty of murder in the second degree, thereby acquitted him of the charge of murder in the first degree

and that the appeal by the State to the Supreme Court of Errors and the new trial upon the same indictment for the same offense exposed him to double jeopardy in violation of these constitutional provisions. So far as the Constitution of Connecticut is concerned, it contains no such provision against double jeopardy, which is found in the constitutions of many States and in Article V of the amendments to the Constitution of the United States; and in State v. Lee, 65 Conn. 265, 30 Atl. 1110, this court held that the provisions of the General Statutes permitting an appeal by the State did not violate any provision of the Constitution of Connecticut. The basis of the reasoning of the court in that case is that there is but one jeopardy and one trial; that where material error is committed on a trial and a new trial is ordered by the appellate court upon the State's appeal, the second trial is not a new case but is a legal disposal of the same original case tried in the first instance. It would be unprofitable to repeat what was said in that opinion which has been referred to by a great jurist as a "well-reasoned decision." Kepner v. United States, 195 U. S. 100, 135, 24 Sup. Ct. 797.

The substance of the appellant's claim is that our statute, permitting an appeal by the State in a criminal case, is in contravention of the Fourteenth Amendment to the Constitution of the United States, and that it abridges his privileges and immunities as a citizen of the United States and deprives him of life and liberty without due process of law. As the claim of the accused raises questions as to the rights secured under the provisions of the Constitution of the United States, we look to the decisions of the Supreme Court of the United States for guidance as to the proper construction of these provisions. In Section 2 of Article IV of the Constitution of the United States, it is provided: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." In Corfield v. Coryell, 4 Wash. C. C. 371, 380, it was said that these expressions were confined "to those privileges and immunities which are * * * fundamental" and that "what these fundamental principles are, it would be more tedious than difficult to enumerate. They

may all, however, be comprehended under the following general heads: protection by the government; * * * with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may * * * prescribe for the general good of the whole." In Ward v. Maryland, 79 U. S. (12 Wall.) 418, 430, they were said to include "the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation; to acquire personal property; to take and hold real estate; to maintain actions in the courts of the State; and to be exempt from any higher taxes or excises than are imposed by the State upon its own citizens."

In the Slaughter House Cases, 83 U. S. (16 Wall.) 36, 75, these cases were quoted from at length, the court holding that the privileges and immunities guaranteed under the Fourteenth Amendment were of the same character as those guaranteed under the Fourth Article of the Constitution; and in Colgate v. Harvey, 296 U. S. 404, 431, 56 Sup. Ct. 252, 259, it was said: "The purpose of the pertinent clause in the Fourth Article was to require each state to accord quality of treatment to the Citizens of other states in respect of the privileges and immunities of states citizenship. It has always been so interpreted. One purpose and effect of the privileges and immunities clause of the Fourteenth Amendment, read in the light of this interpretation, was to bridge the gap left in that Article so as also to safeguard citizens of the United States against any legislation of their own states having the effect of denying equality of treatment in respect of the exercise of their privileges of national citizenship in other states;" and, on page 429, it was said: "Under the Fourteenth Amendment, therefore, the simple inquiry is whether the privilege claimed is one which arises by virtue of national citizenship. If the privilege be of that character, no state can abridge it. No attempt has been made by the courts comprehensively to define the privileges and immunities which the Fourteenth Amendment thus protects." The privileges and immunities of citizens of the United States do not necessarily include all the rights pro-

tected by the first eight amendments to the Federal Constitution against the power of the Federal Government. Maxwell v. Dow, 176 U. S. 581, 597, 20 Sup. Ct. 448. It was held in this case that a trial by a jury of twelve in a state court was not a privilege or immunity of a citizen of the United States, and one might be tried by a jury of eight. In Walker v. Sauvinet, 92 U. S. 90, 92, it was determined that "a trial by jury in suits at common law pending in the state courts is not * * * a privilege or immunity of national citizenship, which the states are forbidden by the Fourteenth Amendment to abridge."

The requirement of "due process of law" is met if the trial is had according to the settled course of judicial proceedings. Murray's Lessee v. Hoboken Land and Improvement Co., 59 U. S. (18 How.) 272, 280. "Due process of law is process due according to the law of the land. This process in the states is regulated by the law of the state." Walker v. Sauvinet, supra, 93. The term "due process of law" appearing in the Fourteenth Amendment of the Constitution of the United States does not require indictment by a grand jury in a capital case in a state court, and prosecution by information, when authorized by the state law, does not offend against this clause. Hurtado v. California, 110 U. S. 516, 533, 537, 4 Sup. Ct. 111.

The accused had the benefit of a fair and impartial trial in accordance with the settled course of judicial proceedings prevailing in this State. Our statute, which permits the State to appeal with the permission of the trial court, was first adopted in 1886 and has been in force for more than fifty years. As construed in State v. Lee, supra, 282, and State v. Carabetta, 106 Conn. 114, 116, 137 Atl. 394, we conclude that it does not subject the accused to double jeopardy or abridge his privileges and immunities as a citizen of the United States, or deprive him of his life or liberty without "due process of law."

There is no error.

In this opinion the other judges concurred.